INDEX.

Page

Table of Cases Cited.

UNITED STATES OF AMERICA

THE SUPREME COURT OF THE UNITED STATES

CORAL W. DUKE, doing business as the Duke Cartage Company, a citizen of the State of Michigan,
Plaintiff and Appellee,

vs.

MICHIGAN PUBLIC UTILITIES COMMISSION, et al.,
Defendants and Appellants.

BRIEF FOR APPELLEES

STATEMENT OF THE CASE

In Appellant's statement of the case, on page 8 of the Appellant's brief it is stated that

> "It was argued also for the plaintiff, though the point was not passed on by the court, that to make those carrying under private contracts common carriers was the taking of private property without compensation, in contravention to the 14th amendment to the United States Constitution."

It should be said that it was also argued to the court that Act No. 209 of the Public Acts of the State of Michigan for 1923 was void, invalid and unconstitutional for

each of the reasons alleged in plaintiff's Bill of Complaint, as found in paragraphs 27, 28, 29, 30, 31, 32, 33, 35, 37, 39 and 40. (See transcript of record, pages 7 to 15).

This appeal is a review of the propriety of issuing a temporary injunction in the court below on the case presented by bill and answers, and the argument to show cause why such a temporary injunction should not issue.

ARGUMENT

I.

Aside from the Constitutional Questions Involved, the Decree of the Court Granting a Temporary Injunction and the Discretion Exercised by Them Cannot be Disturbed on Appeal, in View of the Situation Before the Lower Court at the Time of the Hearing and Decision Granting the Temporary Relief.

It is difficult to see how the case at bar be reversed on this point in view of the position of the state in the record in its answer. On page 24 of the record in this appeal (pars. 41 and 42) the state says that Act 209 "does not apply" to a private carrier and that such carrier "will not be affected in any manner" as the plaintiff feared. In the next paragraph (42) (Record p. 24) of the state's answer, it is announced as the state's position that "if plaintiff is operating solely and exclusively as a private motor vehicle carrier (and on this appeal this fact is admitted) *he does* not fall within the provisions and conditions of said Act No. 209 of the Public Acts of the State of Michigan for the year 1923—and that the provisions of said act will not be enforced against him and will not result in any prosecution or proceeding against said plaintiff, as set forth in paragraph

42 of Plaintiff's Bill of Complaint. Wherefore, defendants state that if plaintiff is solely and exclusively a private carrier of motor vehicle, *he is entitled to the relief prayed in paragraph 2 of his prayer* (this was the prayer for a temporary injunction) *for relief* * * *

The intervenor, representing a competitive carrier by electric railway, now seeks to disturb the propriety of the lower court in granting the temporary injunction on this state of facts. Was there an abuse of discretion in granting the writ under these circumstances? The enforcing authorities of the state utilities commission were enforcing the act against plaintiff's vehicle, (see paragraphs 21 and 24 of Bill, Record p. 6).

The commission by its attorneys in court admit that the act has no application to private carriers. Plaintiff Duke was a private carrier. He was also exclusively engaged in interstate commerce. No question is raised about the authority of the Attorney General of the State of Michigan to appear and represent the Michigan Public Utilities Commission in the District Court.

This court may deal with this situation if it choose and the case may go off on this as well as on any of the constitutional questions involved. On an appeal direct to the Supreme Court from an order of the three judges on an application for new interlocutory injunction pursuant to Section 238 of the Judicial Code—the Supreme Court has jurisdiction to review the whole case.

Van Dyke vs. Geary, 244 U. S. 39, (42).

The intervenor attempts to meet this situation by the use of a case found in 244 Illinois 166. It need only

be said that it appears from the opinion that the admission in that case as said (on p. 171 of 244 Ill.) "had no influence upon the decision of the chancellor, for notwithstanding the admission the finding was for the defendant and the bill was dismissed." In the case at bar the state officers were enforcing the act against plaintiff. In court the plaintiff's counsel admitted that the act was not applicable to a private carrier and that if plaintiff was one "he is entitled to the relief prayed for"—that is, entitled to the temporary injunction, and later a permanent injunction. At the hearing on the order to show cause counsel stated, during the argument, that the act was not to be applied to common carriers. How can it be said that within the meaning of *People vs. P. St. N. & C. R. Co.* 244 Ill. 166 (171) that this situation and admission, had no influence upon the decision of the chancellor?

The court found for the plaintiff and issued the temporary injunction and this is an appeal from the discretion exercised in so doing.

Also under the position taken in appellant's brief the case would not support his position. The holding in his Illinois case was based on "an undisputed state of facts" (p. 171 of 244 Illinois supra). Counsel, in his brief on this point filed in this court on p. 36 expressly says that it is not admitted that plaintiff is a private carrier. He disputes the fact. If this is so he may not properly present the above case, the holding of which is plainly conditioned (among other things) on an undisputed state of facts. (See also p. 37 of Appellant's Brief on this point).

PROPOSITION II.

Act 209 of 1923 is Discriminatory and Invalid Under the Constitution of the United States as Well as of the State of Michigan.

We assume it to be settled that a taxing measure must have some reasonable basis for the classification which it adopts. In the application of the tax, it is our contention that the arbitrary imposition of the status of common carrier upon plaintiff, Coral W. Duke, doing business as Duke Cartage Company in the case at bar, actually discriminates against him in favor of others who make the same use of the highways and whose vehicles damage the highways to the same, or to a greater extent.

Because the plaintiff under private contract carries automobile bodies between Detroit and Toledo for hire he is made by the act a common carrier and must pay a tax in his case amounting to $5,000 over and above his previous taxes, for the privilege of so doing. An automobile body manufacturer of Detroit on the other hand who chooses to carry his own bodies from Detroit to Toledo is not a common carrier within the meaning of the Act because he does not carry for hire, but carries his own bodies. He may carry the same freight over the same highways in the same trucks (or in heavier trucks) and with the same or greater use of the highways and damage thereto, as the plaintiff, and yet he is exempted from the payment of the tax. There is nothing in reason to place him in a different position. Counsel for the state at the argument (and now in the brief here) expressly put the basis of the classification in the statute as an aim to reach those who make

use of the highways of the state with heavy vehicles which damage the road. How, then, may a carrier be taxed under the Act and a manufacturer doing the same business be free without tax? Viewed from this standpoint and under the state's admission of the ground and classification used in the Act, the Act, within the meaning of the protective clause of the Federal and State Constitutions is arbitrary, unreasonable and does not operate uniformly upon those in the same condition.

A discrimination very similar to the one made by Act 209 was held void in *Kellaher vs. Portland,* 57 Ore., 578; 112 Pac., 1076.

A city ordinance laid a tax on the privilege of using the streets on all owners or keeper of any wagon, automobile or other vehicle used for the conveyance of persons or goods or for any other business, as follows, naming a list of vehicles including every vehicle used for business purposes drawn by horses; and of automobiles, *only those used for hire;* omnibuses used in transporting passengers without hire. This was held invalid and void for discrimination, in that it does not include automobiles used by the owners in their own business and not for hire, while vehicles drawn by horses *and used in the same way* are taxed. The court said the classification is arbitrary and not made on a reasonable basis. In the case at bar the exemption of motor trucks of a manufacturer, traveling over the same highway or highways or routes, and carrying the same equipment and load is illegal. The law does not apply uniformly to the class who use the highways by hauling freight in automobile trucks, only those who do so for hire, i. e. for others—must pay the tax and obtain the permit.

In the *Kellaher case* the court said:

> "Classification is for the determination of the legislature provided it is made on some reasonable basis and applicable to all similarly situated, without discrimination."

The Act taxed automobiles for hire, but omitted from its terms automobiles used in connection with the owner's business. As to this the court said (page 1078 of 112 Pac.):

> "However, we are unable to uphold the classification which omits from its terms automobiles used in connection with the owner's business which we are justified in assuming as a matter of common knowledge includes a large number of automobiles used by department stores, brewers, groceries, express companies, physicians and others not used for hire, and are in the same class as those taxed by the ordinance."

And this court may assume as a matter of common knowledge that all those motor vehicles operated over the highways of Michigan by corporations owning them, are in the same class as those taxed by 209 of 1923 and within the same reason for regulation so far as the use of highways is concerned.

Oil companies, creameries, bakeries, manufacturers, in their own vehicles, although not strictly for hire, carry goods over the high ways of the state day in and day out and over the same routes between villages of the state. These are admitted not to be within the purview of the Act. But where is the basis of reasonableness for such

an exemption, having in mind the purpose of the act? Wherein can it be said to meet any of the fundamental requirements of permissive classification? It is unjust, discriminatory and illegal.

The following cases, decided by the Michigan supreme court, held the acts there in question, unconstitutional as discriminatory class legislation.

In *Haynes vs. Lapeer Circuit Judge,* 201 Mich. 138, there was involved "an act for the sterilization of mentally defective persons maintained wholly or in part by public expense and public institutions in this state." The act was held void, the court saying:

> "Conceding, for the purpose of this inquiry, that such legislation is a proper governmental function and within the police power of the state, the question naturally arises, what logical connection with the object sought by this enactment has a classification *which carves a class out of a class* and applies the proposed curative treatment, which it is found the public weal demands and justifies, only to those of the type requiring such exclusive legislation who, by reason of their sequestration under public control, are presumably helpless to work upon those now in being or posterity the mischief which the law is framed to eliminate?
>
> 'The legislature cannot take what might be termed a natural class of persons, split the same in two, and then arbitrarily designate the dissevered factions of the natural unit as two classes, and thereupon enact different rules for the government of each.' 6 R. C. L., p. 383.

*"In this enactment the legislature selected out of what might be termed a natural class of defective and incompetent persons only those already under public restraint, leaving immune from this operation all others of like kind to whom the reason for the legislative remedy is normally and equally at least, applicable, extending immunities and privileges to the latter which are denied to the former. * * * For the foregoing reasons we are constrained to concur in the opinion of the learned circuit judge that this law as framed does not afford, in its scope, those affected by it that equal protection under the laws guaranteed by the Constitution, and so limits the class of defectives covered by its provisions as to be clearly class legislation without substantial distinction within constitutional inhibition."*

In *Davidow vs. Wadsworth Mfg. Co.,* 211 Mich. 90, is found the following:

"It is a trite expression that classification in order to be legal must be rational; it must be founded upon real differences of situation or condition, which bear a just and proper relation to the attempted classification and reasonably justify a difference of rule. * * * If persons under the same circumstances and conditions are treated differently, there is arbitrary discrimination and not classification. *Black vs. State,* 113 Wis. 205; 89 N. W. 522.

'It has been sometimes loosely stated that special legislation is not class if all persons brought

under its influence are treated alike under the same conditions. But this is only half the truth. Not only must it treat alike and under the same conditions all who are brought within its influence but in its classification it must bring within its influence all who are under the same conditions.' * * *

Johnson v. R. R. Co., 43 *Minn.* 222; 45 *N. W.*, 156, 8 *L. R. A.*, 419.

'It is evident that differences which would serve for a classification for some purposes would furnish no reason for a classification for legislative purposes. Such legislation must not only operate equally upon all within the class but the classification must furnish a reason for, and justify the making of the class. That is, the reason for the classification must *inhere in the subject matter and rest upon some reason which is natural and substantial and not artificial.' Bedford Quarries Co. v. Bough*, 168 Ind., 671; 80 N. E., 529; 14 L. R. A., (N. S.), 418.

The court in the Davidow case then proceeded:

"We are of the opinion that the statute under consideration constitutes class legislation of the most objectionable kind. The classification is arbitrary and oppressive and without any valid reason for the basis."

In *Peninsular Stove Co. v. Burton*, 220 Mich., 284, the court held a statute to be illegal class legislation. The title to the act read:

"An act to regulate and control the installation of warm air heating plants and to provide for the

public safety and fire protection in such installation."

The act in question was limited to furnaces enclosed in *galvanized sheet iron.*

The court said:

"It is elementary that all property is held subject to the general police power to regulate and control its use so as to secure the general safety and all reasonable provisions enacted for the preservation of and protection against conflagration is generally recognized as a proper exercise of such power. But legislation to that end must not be unreasonable or discriminatory. It must not single out any class of persons or things and arbitrarily impose burdens upon them not applying to others within the same general class.

The records show that there are several kinds of heating plants, steam, hot air, warm air and stoves, in which wood, coal or coke may be used as fuel. Out of these the legislature selected a class, warm air, for this special regulatory legislation. While the title indicates an intention to regulate *all* plants of this class, the first section of the act confines its operation to 'furnaces enclosed in galvanized sheet iron.' Of this class an exception is made of those which are pipeless or have but one register. We have, therefore, not only the selection of a class of heating plant but of a class of this class. To justify such exaction it must appear that some substantial reason existed for the regulation of this particular kind of heating plant not equally

applicable to the others. Is there greater danger of fire from a plant thus installed than from other warm air heating plants? * * *

But it seems clear to us that the classification here made is not based upon any real or substantial distinction. No sufficient reason has been pointed out for exercising the supervisory control provided for in the act over the installation of a warm air heater enclosed in metal with more than one pipe which does not equally apply to one enclosed in brick or one which has but one pipe."

These three cases speak for themselves. We are unable to perceive wherein what was stated by the court therein does not apply to the case at bar. Act 209 purports in its title to apply to all carriers by motor vehicle operating over the highways of Michigan for hire. Assuming such carriers could be a proper class, yet the act itself carves out a class of this class and limits the act to those carriers only operating over fixed routes and between fixed termini. and exempts altogether a manufacturer carrying his own products over the highways of the state whether over fixed routes or not. We can see no reasonable basis for this distinction. The answer of defendants furnishes but one reason therefore of which we will presently speak.

It must be apparent to the court that carriers operating for hire over the highways of Michigan, by motor vehicle, whose business takes them all over the state or goodly portions thereof but not over fixed routes or between fixed points are given immunities and privileges which plaintiffs do not enjoy, and it is impossible for us to conceive any reasonable distinction that justifies this discrimination. If there is a distinction it surely does

not inhere in the subject matter. By the same token it might be claimed that all persons operating motor vehicles over the highways transporting persons or property should be taxed and regulated. In fact, it is difficult to see why they should not be if these operating over fixed routes or between fixed termini should be.

PROPOSITION III.

Act 209 of the Public Acts of Michigan for 1923 is a Law Impairing the Obligation of Contract Contrary to Section 10, Article 1, of the Constitution of the United States, and Section 9 of Article II of the 1908 Constitution of the State of Michigan.

Before the passage of Act 209 of 1923 the state of Michigan was not without regulatory laws concerning motor vehicles including motor trucks, with all of which plaintiff Duke has complied. The list includes Act 368 of 1917 containing detailed regulations for the issuance of a driver's license and providing for an examination and fees; Act 132 of 1917 containing specifications of the maximum weight of trucks operated on the highways, maximum wheel loads, kind of brakes, kind of tires, carrying capacity of axles, height of wheel, speed, etc. Act 8 of 1919, Extra Session, prescribed limitation in the aggregate width and length of trailers, kind of coupling devices, safety chains, lights and hauling poles. None of these acts contained any exemption from further fees or taxes. But we have not come yet to Act 302 of 1915 as amended by Act 383 of 1919. This was the General Regulatory Act of the state applicable to all motor vehicles operating on the highways of the state. The state required

application for registration, the furnishing of complete and detailed information of the make of machine, number and diameter of its cylinders, horse power. The act provided for the issuance of a license which entitled the owner to operate the vehicle on or over the highways of the state for the license year. As a condition precedent to the issuance of the license, the tax provided by the Act were to be paid. In the case of a motor truck this tax was 25 cents per horse power and 35 cents for each one hundred pounds weight. This tax was to quote the language of the Act to be—"All the lawful tax collectible on such motor vehicle and shall exempt such motor vehicle from all other forms of taxation." Sec. 7 of Act 302 of 1915 as amended by Act 383 of 1919.

Plaintiff Duke complied with this Act paying for his trucks' taxes in the amount of approximately $4100 for the license year January 1st, 1923 to December 31st, 1923.

It is plaintiff's contention that the acceptance by Duke of the grant and offer of the state upon the condition of exemption from further taxation, constituted a contract. And Act 209 of 1923 is a law impairing the obligation of the contract by imposing in the license year 1923 (May, 1923), new conditions and further and other taxes upon his motor vehicle which had already been granted a license to operate over the highways of the state for the year 1923. The degree of impairment is immaterial as a matter of law.

In plaintiff's case the increased tax which he was called upon to pay was upwards of $5000, or more than 100 per cent increase.

The legislature may not bind its successors but it may enact a law which may become a contract that a subsequent legislature may not impair.

State Bank of Ohio vs. Knopp, 16 How. 369;
Ohio Life Ins. Company vs. Debolt, 16 How. 416;
Mechanics' Bankers vs. Debolt, 18 How. 380;
Hall vs. Wisconsin, 103 U. S. 8;
Von Hoffman vs. Quincy, 4 Wall. 554.

The situation in this case must not be confused with those cases holding that the mere imposition of a license is not a contract that such license fee will not be increased.

This is not such a case. Act 302 of 1915, supra (which is admitted to be a revenue measure, as well as a licensing regulation) imposed a license fee or tax, but it did more, it expressly covenanted with the licensee that the tax therein exacted was all the tax the state would exact from the owner applying upon the faith of this promise. Relying on it and calculating upon it, plaintiff applied for and received the license to operate his vehicle over the highways of the state. He has entered upon private undertakings for a consideration fixed in part by the amount of the fees paid, which he had a right to assume would be all the fees exacted from him.

This law of 1923, Act 209, clearly impaired the obligation of plaintiff's existing contract with the state and in so doing violated Section 10, Article I of the Federal Constitution as well as Section 9, Article XI of the Constitution of the State of Michigan and is therefore a nullity under either.

Looking at the tax exemption in 302 of 1915 as amended, what was illegal about it? Can a state not pass a valid tax exemption law? Was 302 of 1915 such a law?

A law which within the meaning of this clause in the Federal Constitution impairs the obligation of contract and undoubtedly includes state statutes. *Canada Southern Railway vs. Gebhard,* 109 U. S. 527; 27 L. Ed., 1020. This contract may be either express or implied. *Fiske vs. Jefferson Police Jury,* 116 U. S. 131; 29 L. Ed., 587. Even an enlistment in the state militia has been held to be a contract in the sense that additional burdens may not be imposed after an enlistment. *State vs. Long,* 136 La., 1; L. R. A., 1915-E, 235; 66 So., 377. As before stated the mere grant of a license such as to carry on a profession, or to operate a motor vehicle (*Ruggles vs. State,* 120 Md. 553) may be considered a permission and not a contract and while the mere imposition of a specific tax such as a license (*Bishoff vs. State,* 43 Fla. 67; 30 So. 808) or a privilege tax (*Western Union Telegraph Company vs. Harris,* Tenn. Ch. App. 52 S. W. 748) may not be an implied contract that such tax will not be increased, yet there is no need in the case at bar to resort to implications. Here is an Act of the State which contained in plain language an express exemption from further taxation, at least for the license year 1923. The answer of the state and the argument at the hearing discloses sufficiently that it is the desire of the state by this law to obtain compensation for its large outlays of money on the improvements on the highways of the state—in other words, in addition to being a regulatory or process measure it is also a revenue measure. In *Paige on Contracts,* Vol. 6, Sec. 3668, appears the following language:

"In striking contrast to the unwillingness of the court to permit legislatures to barter away the police power of the state, or to restrain its exercise in any way is their willingness to allow the state to make valid and binding contracts binding its taxing power or providing for exemption from taxation. Where such contracts are found to exist and their existence is clearly established, they are regarded as binding upon the state and the obligation cannot be impaired by subsequent legislation."

Piqua Branch Bank vs. Knoop, 57 U. S. (16 How.), 369;
Dodge vs. Woolsey, 59 U. S. (18 How.), 331;
Mechanics' & Traders' Bank vs. Debolt, 59 U. S. 15 L. Ed. 401 (18 How.), 380;
Jeff. Branch Bank vs. Skelley, 66 U. S. 436;
Woodruff vs. Tropnoll, 51 U. S. (10 How.), 190; 13 L. Ed. 383.

Prior to the imposition of additional taxes for the license year and apparently to circumvent the clear cut tax exemption given to those who had paid the fees under Sec. 7 of Act No. 302 of the Public Acts, Mich. 1915, the Legislature of Michigan amended this Section 7 by Act No. 128 of 1923 by adding the words in italics, as follows:

"Sec. 7. Taxes to be paid prior to registration. The secretary of state shall collect the following taxes before registering a motor vehicle or vehicles, in accordance with the provisions of this act, which taxes shall be all the lawful tax collectible on such motor vehicle, and shall exempt such motor vehicle from all other forms of taxation, *except that the*

> *legislature may impose further and different specific taxes, or privilege fees,* on certain classes of such motor vehicles."

Then Act 209 of 1923 proceeds in addition to the 25 cents per horsepower and 35 cents per hundredweight levied under 302 of 1915 (and paid by plaintiff Duke) to levy an additional $1.00 per hundredweight.

It needs no argument or citation of authority to maintain that it was quite as impossible legally for the state to violate its contract by this device as by the direct violation contained in the later act of the same session, 209 of 1923. The attempt to legalize the additional tax in Act No. 209, by amending 302 of 1915 during the license year 1923, is as objectionable from the constitutional standpoint as Act 209 of 1923 itself. In No. 128 the state says in effect: we may now violate our contract and in No. 209 they do violate it. The declaration of intention adds nothing to the validity of Act 209, and makes no constitutional preparation for it.

PROPOSITION IV.

Act 209 of 1923 Violates the Due Process Clause of the XIV Amendment, and Deprives Plaintiff Duke of Property Without Due Process of Law.

A legislature of a state may determine whether a stream shall be considered a public highway or not—yet if in fact it is not one, the legislature cannot make it so by simple declaration—since if it is private property—the legislature cannot appropriate it to a public use without providing

for compensation. *Cooley on "Constitutional Limitations," Seventh Edition,* page 863; *Morgan vs. King,* 18 Barb., 284; 35 N. Y., 454. Duke is not in fact a common carrier. The legislature in Act No. 209 has declared him to be a common carrier. He must now carry for the public generally—his equipment is now dedicated to this and can no longer be used to prosecute his private business; it is now taken for the public. His business consisted in two valuable and lucrative private contracts with Detroit automobile manufacturers. Plaintiff's property rights in these contracts have a large money value. This law will take those rights from him without compensation—for if he is a common carrier and must carry for all who offer—his equipment will not be available for the said manufacturers. He moves all their product and his obligation, undertaking, equipment and ability to do this is a reason for his possession of this valuable business—these valuable property rights. Thus does this arbitrary imposition of the status of one who is not a common carrier have also the effect as to plaintiff Duke of depriving him of property without due process of law. The legislature may not appropriate his equipment to the use of the public without compensation for the property rights now inseparably connected therewith.

In this connection, counsel respectfully call the court's attention to the case of

Producers Transp. Co. vs. R. R. Commission of Cal., 251 U. S. 228, (40 Sup. Ct. Rep. 131).

In this case the staute declared that a person or corporation operating "any pipe line or any part of any pipe line * * * * for the transportation of crude oil * * * *

directly or indirectly, *to or for the public*, for hire * * * shall be deemed a common carrier." (Stats Cal. 1913 c. 327; Stats Ex. Sess. c. 14). This is quite different from the case at bar where the statute makes any carrier for hire a common carrier and does not contain the saving clause *"for the public"*. (See Sec. 3 of Act 209 of Public Acts 1923, Michigan). And it is to be expressly noted that the opinion says (p. 230 of 251 U. S.): "It is of course true, that if the pipe line was constructed solely to carry oil for particular producers under strictly private contracts *and never was devoted by its owner to public use, that is, to carrying for the public, the state could not, by mere legislative fiat or by any regulating order of the commission, convert it into a public utility or make its owner a common carrier,* for that would be taxing private property for public use without just compensation, which no state can do consistently with the due process of law clause of the Fourteenth Amendment."

(Citing several cases decided by this court).

The mere fact then, that the pipe line might be constructed and maintained along a public highway of the state would not alone suffice to justify its regulation by an arbitrary imposition on it of a common carrier—if it in fact did not carry for the public.

On page 231 of this case the court also said: "The state court upon examination of the evidence, concluded that the company *voluntarily had devoted the pipe line to the use of the public.* (Italics ours).

It also appeared that it had, in acquiring its right of way, resorted to an exercise of the power of eminent do-

main—permissible only if the condemnation be for public use (Cal. Code Cir. Prac. Sec. 1237-1238) and in that proceeding asserted and obtained a judgment reciting that it was "engaged in transporting oil by pipe line, *as a common carrier for hire,* and that the right of way was sought for a public use," (italics ours) (p. 231 of 251 U. S.)—and the court added (p. 231) " * * * it was apparent that the company did in truth carry oil for *all* producers seeking its service, in other words, *for the public.*" (italics ours).

PROPOSITION V.

Act 209 of 1923 is Void Because it Interferes With the Liberty of Contract Granted to Citizens Within the Meaning of the Fourteenth Amendment to the Constitution of the United States.

The protection of this amendment extends to plaintiff the right to pursue any livelihood or vocation and for that purpose to enter into all contracts necessary and proper for carrying such purposes to a successful conclusion. *Allgeyer vs. Louisiana,* 165 U. S., 589. The general right to make a contract in relation to his business is part of the liberty of the individual protected by the word "liberty" in the Fourteenth Amendment.

Lachner vs. N. Y., 198 U. S., 53.
Coppage vs. Kansas, 236 U. S. 1.
Chicago, etc. R. Co. vs. McGuire, 219 U. S., 549.

Plaintiff chose—lawfully, to make two private contracts with automobile body manufacturers at Detroit, Michigan—by which he would be entitled to compensa-

tion for delivering auto bodies for said factories at Toledo, Ohio. He carries for no one else. He does not and could not possibly carry for the public generally. Act 209 of 1923, by arbitrarily designating him as a common carrier compels him to make other and different contracts with others, with the public, against his will and his ability. It compels him in so doing to forego the profit and benefit of his two private contracts. He has only the equipment necessary to care for the output of these factories. His neighbor may carry these bodies if he be a manufacturer and although doing precisely the same thing in the process, over the same route and in vehicles of the same or heavier type, is yet not, under the terms of the Act, a common carrier. By arbitrarily and unreasonably imposing this status on one so manifestly outside of it, the legislature has deprived plaintiff Duke of property without due process of law. It has deprived him of the right freely to contract within the meaning of the liberty guaranteed to him by the Fourteenth Amendment.

PROPOSITION VI.

Act 209 of the Public Acts of the State of Michigan for 1923 is in Conflict with the Commerce Clause of the Federal Constitution.

Undoubtedly a state may make valid regulations of motor vehicles using its highways by acts and restrictions which may incidentally burden interstate commerce. Act 209, however, is not such an act. It requires the payment of a certain tax or fee which is a direct tax upon the privilege of engaging in it, and a direct charge and burden thereon.

Section 8 of Act 209 of 1923 requires that "Every such carrier shall pay to the commission for the use of the state, or at or prior to the issuance of the permit, *and as a fee for the privilege of engaging in the business* (defined in Section One of the Act) * * * One Dollar for each one hundred pounds weight of each motor vehicle employed by it in such business * * * " It is not the instrumentality used in the business of interstate commerce—but the privilege of engaging in interstate commerce which is taxed.

Equally incompetent to the State was the compulsory insurance requirement of Section 79 Act No. 209 because this also is a burden upon interstate commerce. This section was considered by the lower court (p. 34 record, paragraph 1) as something beyond the permitted regulation of common carriers on the public highways and constituted an attempt by the state to unduly burden interstate commerce, and for that reason void, and it was so held by the lower court (opinion of lower court, Record p. 34).

PROPOSITION VII.

Section 3 of Act No. 209 of 1923 is Unconstitutional Because Too Vague and Uncertain to Furnish a Sufficiently Definite Standard of Guilt.

Section 3 of Act 209 (Record p. 4) provides that:

> "So far as applicable, all laws of this state now in force or hereafter enacted, regulating the transportation of persons or property by other common carriers, including regulation of rates, shall apply

with equal force and effect to such common carriers of persons and property by motor vehicle upon or over the public highways of this state as above provided."

There are on the statute books of Michigan a multitude of laws, many of them highly penal in their nature which, in the Commission's discretion may be made applicable to plaintiff. He cannot know how to regulate his conduct so as to avoid the penalties of these acts, for he does not and cannot know which of them are to be considered applicable to him. See

Kinnane vs. Detroit Creamery Co. 255 U. S. 102.

IX.

Comment on Cases in Appellant's Brief and Conclusion.

Some of the cases in appellants' brief have already been mentioned. Others will now be briefly discussed. Practically all of them deal with common carriers—to whom the public had to resort. Even in the *Pipe Line cases,* 234 U. S. 548 (discussed on pp. 16-17 of Appellants' brief) it appears from the argument of the Solicitor General for the United States (p. 550 of 234 U. S.) that no other means of transportation could possibly compete with pipe lines and that if a well owner could not ship by pipe line, he could not (practically) ship at all. And the Solicitor stated the object of the Act (Hepburn Act) to be: "to regulate interstate commerce in oil by protecting well owners and independent refiners from duress by pipe line owners* * *" (p. 550 of 234 U. S.). The plaintiff

in the case at bar occupied no such situation to the public. No one was compelled to resort to him. Shippers could use Intervenor's Street Railway or any of the numerous carriers by motor vehicle who held themselves out to the public as carrying generally for anyone who offered freight.

It is an issue in this case (if the appellants be not concluded by the position taken in the answer of the State in the lower court and the admissions made upon the argument for the temporary injunction) whether one who is not a common carrier in fact—may be embraced within Act 209 of 1923 of the State of Michigan.

It serves no useful purpose to multiply cases announcing the undisputed power of a state to regulate common carriers on the highways. No one disputes such generalities, as generalities, as are found in appellants' brief on this point. Such for example as the excerpt from an opinion (p. 12 appellants' brief) to the effect that:

> "We have repeatedly held that the legislature may regulate the use of the highways for carrying on business for private gain, and that such regulation is a valid exercise of the police power."

It seems to be considered that a State in its magic omnipotence over the subject of highways and common carriers, is in some mysterious way, in enacting law touching these subjects—especially highways—relieved of the necessity of any constitutional restraint—of the limitations that under our system of government both Federal and State—surround every piece of legislation. Certainly the state may regulate but it must do so in a constitutional manner,

—and the State of Michigan has not done so in Act No. 209 of 1923. That there may be a perfectly valid law passed regulating private carriers as well as common carriers is undisputed—that the approaching session of the Michigan legislature will do so is not improbable.

Even if it be assumed (which appellees do not admit) that Act No. 209 could declare private i. e. contract carriers to be common carriers and subject to the regulations and tax imposed by the act, yet the classification "for hire" still excludes and exempts a class, manufacturers and other large distributing corporations which uses the same highways commercially—in vehicles of the same kind exactly—of as great weight—doing the same damage to the roads—carrying the same kinds of freight (by automobile bodies)—and presenting the same problems of danger and traffic. The latter, however, are not within the act. Although within the reason and logic of the purpose of the act and its regulations they are, nevertheless, exempt. They pay no fee—they need apply for no permit. A and B come squarely within the reason of the law and its regulations. A must pay the tax—B is absolved. Whether the test be one of common sense or logic or the adjudicated cases on permissive classification—we arrive at the same result—namely that there is no fairness, justice, reasonableness or logic in the attempted classification. The act is void as an unreasonable and arbitrary classification of the persons and corporations who shall be subject to it. Its operation is not uniform.

At the hearing on the order to show cause why the temporary injunction should not issue, the state took the position before the court—(also in its answer and later in the brief filed below)—that the act was not applicable

to private carriers. The state police authorities and the Public Utilities Commission were however actively enforcing the act against the plaintiff applying for the injunction. It is likely that this situation influenced the exercise of the court in granting the temporary injunction. In view of this and in view finally of the constitutional aspect of the case, we submit that the order granting the injunction should stand and the judgment below be affirmed.

Percy J. Donovan,
Hal. H. Smith,
Attorneys for Plaintiff and Appellee.